No. 12,562

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor, and PETER LATHOURAKIS,
Appellees.

APPELLANT'S REPLY BRIEF.

R. E. ROBERTSON,
Seward Building, Juneau, Alaska,
ROBERT W. HOLLAND,
BOGLE, BOGLE & GATES,
Central Building, Seattle 4, Washington,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 12,562

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor, and PETER LATHOURAKIS,
Appellees.

APPELLANT'S REPLY BRIEF.

Appellant particularly objects to appellees' statement of facts (Appellees' Brief pp. 1 to 3) because that statement does not confine itself to facts alone, but includes appellees' conclusions upon which they base their contention that the lower Court's judgment should be sustained, for instance:

The evidence does not show that Lathourakis sustained severe injuries to his chest or that those to his right arm were of such severity as to temporarily disable him beyond October 1, 1948 (R. pp. 87, 91, 92).

The evidence does not show that Lathourakis was unable to swallow solid food. He himself admitted that he could eat hamburgers and fish (R. p. 25). He told Dr. Gray that what he could not swallow was meat (R. 94).

The evidence does not show nor does the record have any evidence of any additional disabilities.

What Lathourakis claimed in his application for adjustment of claim was crushing injury to right arm and severe injury to chest, esophagus and abdomen (R. 9).

ARGUMENT.

COMPETENT EVIDENCE.

Appellees admit that the findings of the Board must be supported by competent evidence (Appellees' Brief p. 4). They seek to maintain that burden by treating incompetent evidence as though it was competent evidence, and by ignoring the competent medical evidence adduced at the hearing.

Lathourakis' testimony that his right arm is numb, pains him when he does a little work, that he has very little grip in his right hand, and that two of his fingers are numb (Appellees' Brief p. 4) relates to subjective symptoms only which are not visible and the cause whereof he was not competent to state. Evidence is not competent of such causation unless adduced by an expect in human anatomy (Appellant's Main Brief pp. 17-19). Actually Lathourakis did not

state that that claimed condition was due to the accident. Nor was he qualified to testify thereto.

PERMANENT PARTIAL DISABILITY.

Dr. McGowan's testimony in respect to Lathourakis' partial permanent disability (Appellees' Brief p. 5) was clearly and distinctly confined to disability that Lathourakis suffered, not from the claimed accidental injury, but from the operation (Appellant's Main Brief pp. 41, 42; R. pp. 52, 80, 81).

The fact, if it be true, that Lathourakis was a high-boat fisherman, had fished for 22 years and had been a strong, powerful man prior to 1948 does not justify the inference that whatever his claimed condition was at the hearing in 1949 was due to the accident. The public press daily instances men, seemingly strong and healthy, suddenly dying or becoming ill from heart or other serious diseases; in other words, Lathourakis' prior outward or apparent good physical condition is not proof of absence of physical conditions impelling or requiring his serious operation, which operation the evidence as stated showed was not required because of the accidental injury.

Dr. Gray did not at any time concede that in his opinion Lathourakis' condition, to correct which the operation was performed, was caused by the accident; in fact, Dr. Gray specifically said: "I came to the opinion that the trauma of the chest had apparently no direct relationship to this injury" (R. 90).

Appellant has no quarrel with the general legal principles announced in the various cases cited by appellees (Appellees' Brief pp. 9 to 12); but, appellant does contend that those decisions have no pertinency in this case and in no wise authorize an award of compensation to an injured employee unless that award is based upon competent evidence proving that the employee is entitled to compensation under the Act.

Appellant appreciates that a medical expert's testimony is not so sanctified as to not be subject to disbelief, if the forum hearing that testimony has reasonable ground to believe from the doctor's attitude or demeanor upon the witness stand that his testimony, whether in opinion or other form, is not true; but, appellant submits that some reasonable ground must appear for such disbelief, and that the record fails to show any reason whatsoever for disbelieving either Dr. Gray or Dr. McGowan.

Furthermore, the rule is, appellant believes, as appears in *Stralovich v. Sunshine Mining Co.*, 201 Pac. (2d) 106, 112, which quotes from *Wallace v. Hogue, et al.*, 185 Pac. (2d) 711, that greater weight will be given to the testimony of a doctor who testifies from personal knowledge of his patient's condition than to medical hypothetical testimony of that patient's condition. The testimony of Dr. Gray and Dr. McGowan is based upon personal examinations of Lathourakis made in an attempt to cure his physical ailments.

The letters of Dr. Williams and Dr. Slyfield are not only unverified, but they very apparently were based

upon examinations made, not to cure Lathourakis, but to obtain information to help him support his claim (Appellant's Main Brief pp. 20 to 21).

If appellees' theory should be adopted, then the Industrial Board could disregard all evidence adduced before it, regardless of any basis for discrediting that evidence, and base its finding entirely upon its own individual prejudices or knowledge.

ADMISSION OF PHYSICIANS' REPORTS.

Appellees seemingly (Appellees' Brief pp. 13 to 14) actually hope to sustain the trial Court's judgment upon the *ex parte,* unverified statements contained in the letters of Dr. Williams and Dr. Slyfield, notwithstanding, as stated, appellees admit that the Board's finding must be based upon competent evidence (Appellees' Brief p. 4). Appellant so thoroughly discussed the inadmissibility of Dr. Williams and Dr. Slyfield's letters in its main brief (Award must be based upon competent evidence; Appellant's Main Brief pp. 14 to 36) and the incompetency thereof as well as of the testimony of Lathourakis and Sheils to prove that Lathourakis' condition or the extent or duration thereof was caused by his claimed injury, that no necessity exists for reiteration herein. Appellant also thoroughly discussed the proposition that the competent evidence adduced at the hearing proved that Lathourakis suffered no permanent disability from his injury (Appellant's Main Brief pp. 36 to 48).

But, appellees seemingly also argue (Appellees' Brief p. 8) that the Board might legally base its findings upon nothing more than Lathourakis' appearance and demeanor upon the witness stand when giving his evidence before the Board.

Appellant concedes that any forum may take into consideration the appearance and demeanor of a witness appearing before it in determining the weight and credibility to be given to that witness' testimony; but, appellant submits that, as so admitted by the appellees as hereinbefore stated, the findings of the Board must be based upon competent evidence, and the Board has no authority to make any finding except upon competent evidence regardless of what personal knowledge the Board may have of local conditions in Alaska.

Appellant contends that the reports and letters of Drs. Williams and Slyfield were not admissible in evidence for any purpose whatsoever (Appellant's Main Brief pp. 19 to 36) and that the provision of the Act that "the Industrial Board may make rules not inconsistent with this act for carrying out the provisions hereof", Section 43-3-14 A.C.L.A. 1941 (Appendix "A" p. 29; Appellant's Main Brief pp. 7-36) does not authorize the Board by rule or otherwise to base a finding upon other than competent evidence.

Appellant submits that the law nowhere authorizes the admission of incompetent evidence at a hearing upon a contested claim before the Board or the basing of a finding upon hearsay or *ex parte* evidence.

The Washington Supreme Court has specifically overruled its two decisions (Appellees' Brief p. 9) in *Devlin v. Department of Labor,* 78 P. (2d) 952, and *McKinnie v. Department of Labor,* 37 P. (2d) 218, in its subsequent decision in *Hutchings v. Department of Labor,* 167 P. (2d) 444, 449, 450, and by a long line of cases has sustained the principle for which appellant contends in this case, namely: that even in a workman's compensation case a finding of the Board must be based upon competent evidence.

In *Sweitzer v. Department of Labor,* 34 P. (2d) 350, that Court upon rehearing, reversed its previous decision in 30 P. (2d) 980 and held that the report of a doctor who was not sworn as a witness was erroneously admitted in evidence; hence, that the decision of the joint board and the finding of the Superior Court were not entitled to a presumption of correctness.

That principle was sustained by that Court in—

Brown v. Department of Labor, 161 P. (2d) 533, 534.

That doctrine was again reaffirmed in *Hutchings v. Department of Labor,* supra, wherein, as stated, not only were the previous *McKinnie* and *Devlin* cases overruled, but the Court also held that no part of the *ex parte* record, simply because the statute required it to be certified up to the Court, was admissible except subject to rules of evidence applicable to civil cases and that a letter written by the alleged injured employee to a physician was neither competent nor relevant.

The Washington Supreme Court has reaffirmed this rule in such late cases as—

Karlson v. Department of Labor, 173 P. (2d) 1001, 1012;

Olympia Brewing Co. v. Department of Labor, 208 P. (2d) 1181, 1185;

Lindsey v. Department of Labor, 213 P. (2d) 316, 317.

Appellant is not unmindful of the rule laid down by this Court in *Contractors et al. v. Pillsbury,* 150 F. (2d) 310, 312 (Appellees' Brief p. 18); but, appellant urges that this Court neither in that nor any case has ever held other than that a finding must be based upon competent evidence.

Nor did the United States Supreme Court hold to the contrary in its two decisions cited by Mr. Circuit Judge Bone in the *Contractors* case. Mr. Justice Hughes specifically said: "We think there was evidence to support the finding of the Deputy Commissioner" in

South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 261, 84 L. Ed. 732, 737, 738.

It is also clear that the United States Supreme Court holds that the inference leading to any finding must be based upon evidence. See:

Norton v. Warner Co., 321 U.S. 565, 568, 88 L. Ed. 931, 935.

Appellant challenges appellees' contention (Appellees' Brief p. 18) that hearsay or any other incompetent evidence is admissible for the purpose of

being given such weight as the forum by whom a contested claim is heard may deem it entitled to, or that any such principle is supported by either

Lallier Construction Co. v. Industrial Commission, 17 P. (2d) 534,

or

Employers etc. v. Industrial A. C., 151 Pac. 423,

or by any other decision cited by appellant (Appellant's Main Brief pp. 30 to 37) except in such cases and for such specific purposes as some state statutes authorize, which is not true of the Alaska statute (Appendix "A", pp. 1-52, Appellant's Main Brief).

ALASKA WORKMEN'S COMPENSATION ACT DOES NOT AUTHORIZE RECOVERY OF BOTH TEMPORARY DISABILITY COMPENSATION AND PERMANENT, EITHER PARTIAL OR TOTAL, DISABILITY COMPENSATION AS A RESULT OF ONE AND THE SAME INJURY.

Appellees' opposition to this contention is based entirely upon the trial Court's statement in its opinion that appellant's analysis of the Alaska Workmen's Compensation Act, while plausible, appeared to rest largely upon conjecture and speculation as to legislative intent (Opinion, R. p. 122; Appellees' Brief pp. 19-20).

Appellant thoroughly analyzed the Act to establish that that law clearly permits none other than this construction as contended by appellant (Appellant's Main Brief pp. 48 to 68); hence, appellant believes no necessity exists to further elaborate on that analysis.

With all due respect to the learning and ability of the lower trial judge, appellant challenges his conclusion that appellant's analysis is based upon conjecture or speculation. Appellant urges that nothing in that law (Appellant's Main Brief, Full Text, Appendix "A" pp. 1 to 52) can be found to sustain the contention that both total temporary disability compensation and permanent, either partial or total, disability compensation can be awarded for one and the same injury, or that sub-section 43-3-1 thereof (Appendix "A" pp. 10, 11, Appellant's Main Brief) can be read other than as contended by appellant (Appellant's Main Brief pp. 51 to 55); hence, that the trial Court was incorrect in stating that the language of the Act was not subject to appellant's construction of it.

RECOVERY OF ATTORNEYS' FEES ON APPEAL.

Appellant has discussed this question in its main brief (pp. 68 to 73) and believes no necessity exists to reiterate its argument other than to point out that the appellees clearly fail (Appellees' Brief pp. 20-21) to give any heed to the fact that attorneys' fees allowable as costs under Section 55-11-55, A.C.L.A. 1949, are specifically limited to the classes of cases set out in Section 55-11-51, A.C.L.A. 1949 (Appellant's Main Brief p. 73), whereas workmen's compensation claims are not wthin any of those classes.

CONCLUSION.

Appellant again urges that the judgment of the District Court and the decision and award of the Alaska Industrial Board should be reversed and modified to holding that appellee Lathourakis' total temporary disability ended on October 1, 1948, for which he was entitled to be paid total temporary disability compensation of $1050.80 only, which was paid him prior to his making and filing his claim herein (R. 10), and that he sustained no permanent either partial or total disability whatsoever and is not entitled to be paid any permanent either partial or total disability compensation; and, that the judgment of the District Court should be reversed in the allowing appellee Lathourakis an attorney fee of $350.00, or any sum, as an allowable cost for the services of his attorney in the proceedings on appeal before the District Court.

Dated, October 9, 1950.

Respectfully submitted,

R. E. ROBERTSON,

ROBERT W. HOLLAND,

BOGLE, BOGLE & GATES,

Attorneys for Appellant.